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In the

Supreme Court of the United States

October Term, 1973

No. 73-930

MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RONALD E. MATTESON,
LOREN R. MCQUEEN,
2633 S. Bascom Ave.
Campbell, Ca 95008

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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No.....

MARITIME COMMUNICATIONS SERVICE,

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FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner, Maritime Communications Service, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, filed on September 20, 1973.

CONFLICTING OPINIONS.

In compliance with motions by both the respondent and the petitioner, the United States Court of Appeals for the Ninth Circuit transferred this proceeding, without prejudice, to the United States Court of Appeals for the District of Columbia Circuit, see Order on Appendix Exhibit A. However, the transferee court, by way of dismissal, has refused to hear the case, see Order on Appendix Exhibit B.

JURISDICTION.

Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 20, 1973 and this petition for certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 47 USC §402(j) and 28 USC §1254(1).

QUESTIONS PRESENTED.

1. Whether, if in the interest of justice, a United States Court of Appeals, without subject matter jurisdiction, has power to transfer a timely filed Petition For Review of an Administrative Order if a statute of limitation will prevent another filing in a court with subject matter jurisdiction.

2. Whether the thirty day limit for appealing in the District of Columbia Circuit, as set forth by 47 USC §402 (c), is tolled due to a timely filing in the Ninth Circuit.

STATUTORY PROVISIONS INVOLVED.

1. 47 USC §402 (b).

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia Circuit in any of the following cases:

(1). By any applicant for a construction permit or station license whose application is denied by the Commission.

2. 47 USC §402 (c).

Such appeal shall be taken by filing a notice of appeal with the court within 30 days from the date upon which notice is given of the decision or order complained of.

3. 47 USC §402 (j).

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefore under section 1254 of title 28, by the appellant.

STATEMENT OF THE CASE.

Petitioner, Maritime Communications Service, MCS, is a California partnership composed of two partners, Ronald E. Matteson and Loren R. McQueen. In April of 1968, petitioner applied to the Federal Communications Commission for a Class III public correspondence marine radio station license so as to serve boaters in the general area of

San Francisco, California. A major purpose of this type of station is to allow a boater, by use of the ship's radio equipment, to telephone his residence or office and preferably at a local toll free telephone rate, (FCC Rule 81.3(j) and FCC Docket No. 19360.) Pacific Telephone Company, a subsidiary of Bell Telephone, filed a petition to deny the application of MCS, however, certain company officials made it clear that the petition to deny would be removed if MCS would agree not to serve the San Francisco Bay Area.

Initial Decision FCC 71D-84, released November 9, 1971, concluded that MCS should receive a grant but for the fact that co channel interference would result with an existing station owned by Pacific Telephone Company and located inland at Vacaville, California. Licenses were granted to Western California Telephone Company and Salinas Valley Radio Telephone Company. Coverage area of the proposed station of MCS would have included not only that area served by the two grantees but also the entire San Francisco Bay area.

MCS filed exceptions to the FCC Review Board and MCS concluded that Federal Rules of Evidence and Federal Rules of Procedure would not uphold the finding of co channel interference between the proposed station of MCS and the existing station of Pacific Telephone Company, therefore, the finding of any intereference was arbitrary. MCS further believed that a grant to Western California Telephone Company and Salinas Valley Radio Telephone Company, without a grant to MCS, would fall far short of best serving public interest, convenience

and necessity when considering the basic purpose of this type of station. FCC 72R-311, released November 1, 1972 upheld the Initial Decision and it was again mentioned that co channel interference was the cause for MCS not receiving a grant.

In an Application for the Review Of The Board's Decision, MCS held that it was denied the constitutional right to a fair and impartial hearing. Also, in an Application for the Review Of The Board's Decision, California Senator Alfred E. Alquist, as spokesman for certain named commercial and private boaters, concluded that the decision of the FCC did not best serve public interest, convenience and necessity. The Full Commission in FCC S73-332, released April 3, 1973, upheld the Review Board's decision and by the use of a technicality dismissed the Alquist Application. Pursuant to 47 USC §402 (c), MCS had until May 3, 1973 to appeal the FCC Order, however, on April 17, 1973, or sixteen days before the time limit for appealing had expired, the FCC actually issued licenses to Western California Telephone Company and Salinas Valley Radio Telephone Company.

In this proceeding, the proposed stations, the affected existing stations, and the concerned public boaters were in nexus with the United States Court of Appeals for the Ninth Circuit. In good faith and absolutely without ill intent, MCS construed "may" (see 47 USC §402 (b), *supra*), as being permissive and not mandatory to appeal in the District of Columbia Circuit, therefore, a petition for review of Order was timely filed in the Ninth Circuit on May 2, 1973. After the thirty day

time limit for appealing to the District of Columbia Circuit had expired, respondent FCC moved that the Ninth Circuit either transfer the case to the District of Columbia Circuit or dismiss the case due to the fact that 47 USC §402 (b) placed exclusive subject matter jurisdiction in the District of Columbia Circuit. MCS moved that the Ninth Circuit either entertain jurisdiction or transfer the case. By Order, filed May 31, 1973, see Appendix Exhibit A, the Ninth Circuit transferred this case, without prejudice, to the District of Columbia Circuit.

Motions to dismiss were filed in the District of Columbia Circuit. These motions concluded that the Ninth Circuit was without power to transfer the case and that the thirty day filing limitation had expired before the case was Ordered transferred to the District of Columbia Circuit. By Order, filed September 20, 1973, see Appendix Exhibit B, the District of Columbia Circuit granted the motions to dismiss this case.

REASONS FOR GRANTING THE WRIT.

1. California public policy favors preservation of an action that is filed in a court which lacks subject matter jurisdiction.

"No appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court and proceeded therein as if regularly appealed thereto."

(Wests annotated California Codes, California Constitution Art. 6 §4a p. 88.) (See also *Eldridge v. Richfield Oil Corp.*, 247 F Supp. 408.)

2. United States Legislative intent follows an underlying philosophy that the decisive question in a law suit should focus on the merits and not on esoteric technical problems of procedure.

Being an alternative to the harshness of dismissal, 28 USC §1406 (a), "cure or waiver of defects," is often times broadly construed. In reliance upon legislative intent, it was held that a court had power to effect a valid transfer even when personal jurisdiction was lacking, (*Goldlawr Inc. v. Marcus Heiman*, 8 L Ed. 2d 39.) 28 USC §1406 (c) further enlarged legislative intent by allowing a District Court, without subject matter jurisdiction, to validly transfer the case to a proper Court of Claims, (1960 U.S. Code Cong. and Adm. News, p. 3585.) In reliance upon 28 USC §1406 (a), courts without apparent subject matter jurisdiction have transferred a case so as to preserve the cause of action, (*Peoples Bank & Trust Co. v. Rue*, 210 F Supp. 953; *Ferguson v. Kwik-Chek*, 308 F Supp. 78.) In reference to an applicable statute of limitation, a timely filing displays the dilligence which a statute of limitation is intended to insure, therefore, tolling should be appropriate, (*Goldlawr Inc. v. Marcus Heiman, supra.*) Finally, in *Koehring Company v. Hyde Construction Company, Inc.*, 15 L Ed. 2d 416), it was held that an Appellate Court can transfer a case. In the interest of justice, a United States Court of Appeals should have an inherent jurisdiction so as to

determine jurisdiction and also the accompanying power to effect an enforceable transfer to a proper court.

3. Lacking a Federal transfer law, the United States Court of Appeals for the Ninth Circuit could follow California public policy and validly transfer the case pursuant to 28 USC §1652.

This transfer would adhere to legislative intent and also allow petitioner a day in court so as to be heard on the question of whether there was a fair and impartial Administrative Hearing, (*Aero Design & Engineering Co. v. Oklahoma Employment Security Commission*, 151 F Supp. 844.)

CONCLUSION.

In the interest of justice, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Dated: December 13, 1973.

Respectfully submitted,

RONALD E. MATTESON,
LOREN R. MCQUEEN,

APPENDIX

EXHIBIT A

FILED

MAY 31 1973

DENNIS R. MATHEWS, CLERK
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION,

Respondents

No. 73-1789

O R D E R

Before: DUNIWAY and TRASK, Circuit Judges

47 U.S.C. § 402(b) vests exclusive jurisdiction over this matter in the United States Court of Appeals for the District of Columbia. It appearing, therefore, that this Court is without jurisdiction in the underlying matter, the motion of petitioner for a stay of certain orders of the Commission pending appeal will be denied without prejudice, and the petition for review of the Order of the Commission denying petitioner a construction permit for a Class III-B transmitter (Docket No. 19,006) will be ordered transferred without prejudice to the Court of Appeals for the District of Columbia.

BEN. C. DUNIWAY

United States Circuit Judges

MoCal 5/29/73

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EXHIBIT B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1642 September Term, 1973

Maritime Communications Service,
Petitioner

v.

Federal Communications Commission,
Respondent

Pacific Telephone and Telegraph Co.
Salinas Valley Radio Telephone Co.
Intervenors

United States Court of Appeals
for the District of Columbia Circuit
FILED SEP 20 1973
HUGH E. KLINE
CLERK

Before: Bazelon, Chief Judge; Tamm and Robinson, Circuit Judges

O R D E R

On consideration of petitioner's motion for stay pending appeal, intervenors' motions to dismiss petition for review and of the responsive pleadings with respect to the foregoing, it is

ORDERED by the Court that the aforesaid motion to dismiss is granted and the petition for review herein is dismissed.

Per Curiam

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-930

MARITIME COMMUNICATIONS SERVICE,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

PACIFIC TELEPHONE AND TELEGRAPH CO.,
SALINAS VALLEY RADIO TELEPHONE CO.,
Intervenors-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important question of Federal law nor is the order of the court of appeals in conflict with the decisions of this Court or with the decision of any other circuit.

The Communications Act clearly provides that an appeal from an administrative order of the type here in

question may be taken only to the Court of Appeals for the District of Columbia Circuit. Petitioner, nonetheless, sought review of the order in the Court of Appeals for the Ninth Circuit. That court, after expiration of the time for appeal, sought to transfer the matter to the District of Columbia Circuit. The Ninth Circuit had neither jurisdiction over the subject matter nor any authority to make a transfer and therefore the District of Columbia Circuit properly ordered the matter dismissed.

STATUTES AND RULES

The statutes involved in this case are § 402(a), (b), (c) and (e) of the Communications Act (47 U.S.C. § 402 (a), (b), (c) and (e); 66 Stat. 718 et seq.) and 28 U.S.C. §§ 2342 and 2343. The rules involved are Rule 26(b) of the Federal Rules of Appellate Procedure and Rule 12(h)(3) of the Federal Rules of Civil Procedure. These statutes and rules are set forth in pertinent part in the Appendix to this brief.

In its argument, petitioner makes reference to other statutes and cases involving other statutes. Those statutes (28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a) and (c), 28 U.S.C. § 1652 and 28 U.S.C. § 2112(a)) are also set forth in the Appendix to this brief.

QUESTION PRESENTED

The questions stated by petitioner (Pet., p. 2) are not accurate. The Communications Act expressly provides that review of Federal Communications Commission or-

ders denying applications for radio station construction permits may be had only in the Court of Appeals for the District of Columbia Circuit (47 U.S.C. § 402(a) and (b); 66 Stat. 718).

The question presented, therefore, is: When the District of Columbia Circuit is expressly vested with subject matter jurisdiction to review a particular order to the exclusion of all other courts of appeals, may a petition for review of such an order be effectively filed in another court of appeals and may such court effectively transfer the matter to the District of Columbia Circuit after the time to seek review has expired?

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and much of it is irrelevant to the question presented.

After hearings in which substantial evidence was reviewed, on April 3, 1973, the Federal Communications Commission ("FCC") issued its opinion and order which denied petitioner's application for a permit to construct a new public Class III-B coast radio station near Almaden, California. The FCC based that denial upon its finding that the proposed station would cause intolerable cochannel electrical interference with a nearby radio station of the same class licensed to respondent The Pacific Telephone and Telegraph Company ("Pacific Telephone"). In the same order, the FCC granted applications of Western California Telephone Company ("Western") and Salinas Valley Radio Telephone Company ("Salinas") for permits to construct new stations of the

same class near Santa Cruz and Pebble Beach, California, respectively.

On May 2, 1973, petitioner filed with the Ninth Circuit a "petition for review of order." By order filed May 31, 1973, the Ninth Circuit ordered the matter transferred without prejudice to the District of Columbia Circuit on the ground that exclusive jurisdiction over the matter was vested in the latter court (Exh. A to Pet.). Thereafter, the clerk of the Ninth Circuit transmitted all the papers to the clerk of the District of Columbia Circuit.

Pacific Telephone, Western and Salinas intervened in the proceedings as interested persons (47 U.S.C. § 402(e); 66 Stat. 718-719). Thereafter, Pacific Telephone and Salinas filed motions with the District of Columbia Circuit requesting dismissal. By per curiam order, without opinion, the District of Columbia Circuit granted the motions to dismiss (Exh. B to Pet.).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY ORDERED THE MATTER DISMISSED IN ACCORD WITH THE APPLICABLE STATUTES AND DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

The Communications Act (47 U.S.C. §§ 151, et seq.; 48 Stat. 1064, 66 Stat. 718) requires that appeals from FCC orders denying radio applications be taken to the Court of Appeals for the District of Columbia Circuit. Section 402(b) of the Act provides that:

> "Appeals may be taken from decisions and orders of the Commission to the United States Court of

> Appeals for the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit or station license, whose application is denied by the Commission" (47 U.S.C. § 402(b); 66 Stat. 718).

It is clear that section 402(b) provides the *exclusive* manner of judicial review of the orders listed therein. Section 402(a) provides for review by all circuits of other FCC orders and it expressly declares that it is applicable to "any order of the Commission under this Act *(except those appealable under subsection (b) of this section)*" (47 U.S.C. § 402(a); 66 Stat. 718; emphasis added).[1]

Acting under these clear provisions, courts of appeals have held that only the District of Columbia Circuit has jurisdiction to review orders under § 402(b) and courts of appeals other than the District of Columbia Circuit have uniformly dismissed, for lack of jurisdiction, purported appeals from such orders (*WHDH, Inc. v. United States* (1 Cir. 1972) 457 F.2d 559, 560-561; *Cook, Inc. v. United States* (7 Cir. 1968) 394 F.2d 84, 85-87; *Helena TV, Inc. v. Federal Communications Commission* (9 Cir. 1959) 269 F.2d 30, 31; and see *Kessler v. F.C.C.* (D.C. Cir. 1963) 326 F.2d 673, 679, ftn. 4; *O'Neill Broadcasting Company v. United States* (D.C.Cir. 1956) 241 F.2d 443, 444-445).

The foregoing decisions are in accord with the general rule that in the absence of both subject matter jurisdic-

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[1]Venue in a proceeding under § 402(a) is in the court of appeals of the judicial circuit in which the petitioner resides or has its principal office or in the District of Columbia Circuit (28 U.S.C. §§ 2342 and 2343; and see Appendix, pp. i-ii).

tion and statutory authority to transfer, the only possible judgment is one of dismissal (*Gregory Consolidated Mining Co. v. Starr* (1891) 141 U.S. 222, 227; *Sena v. United States* (8 Cir. 1906) 147 Fed. 485, 490; and see Federal Rules of Civil Procedure, Rule 12(h)(3)). The cases are uniform that a Federal court has no power to transfer a case to another Federal court in the absence of statutory authority granting such power (*Gulf Oil Corporation v. Federal Power Commission* (5 Cir. 1964) 330 F.2d 824, 825; *Brucker v. Fisher* (6 Cir. 1931) 49 F.2d 759, 761; *Brown v. Heinen* (D.Minn. 1945) 61 F.Supp. 563, 564; and see *Swift & Co. v. United States* (1928) 276 U.S. 311, 321-323; *Timken Co. v. Penna. R.R. Co.* (1927) 274 U.S. 181, 185-188).

Petitioner concedes that the Ninth Circuit had no jurisdiction over the subject matter and no statutory authority to transfer the matter (Pet., pp. 2, 8). It follows that both the filing with the Ninth Circuit and the Ninth Circuit's purported transfer were of no effect.[2] Therefore,

---

[2]*Valley Vision, Inc. v. F.C.C.* (9 Cir. 1968) 399 F.2d 511 relied upon by petitioner in its pleadings below, involved a transfer under the express authority of 28 U.S.C. § 2112(a) which empowers a court of appeals to which proceedings with respect to a commission order have been transferred to "transfer all the proceedings with respect to such order to any other court of appeals." In that case, Valley Vision, Inc. had sought review of FCC orders in both the Ninth Circuit and in the District of Columbia Circuit. The District of Columbia Circuit, observing that it believed that it had jurisdiction, nonetheless ordered the proceedings transferred to the Ninth Circuit in accord with 28 U.S.C. § 2112(a) because the matter had first been filed there (*Valley Vision, Inc. v. F.C.C.* (D.C.Cir. 1967) 383 F.2d 218, 219). The Ninth Circuit thereafter decided (399 F.2d 515) that the matter was reviewable only under § 402(b), wherein the District of Columbia Circuit had exclusive jurisdiction, and it transferred the matter back to the District of Columbia Circuit.

the filing with the Ninth Circuit could not have tolled the time to appeal which expired on May 3, 1973, 30 days following public notice of the FCC's order (47 U.S.C. § 402(c)). Petitioner's papers were not transferred to the District of Columbia Circuit until subsequent to May 31, 1973, about a month after the time to appeal had expired. That court was, therefore, without jurisdiction to hear the appeal (*United States v. Robinson* (1960) 361 U.S. 220, 229-230; *Alexander v. Sacha* (9 Cir. 1971) 439 F.2d 742, 743). Being without power to extend petitioner's time for filing a notice of appeal (*Smith v. United States* (9 Cir. 1970) 425 F.2d 173, 174; *United States v. Rayburn* (8 Cir. 1937) 91 F.2d 162, 164; Federal Rules of Appellate Procedure, Rule 26(b)), it correctly dismissed the matter.

II. THE PETITION SETS FORTH NO VALID GROUND UPON WHICH IT SHOULD BE GRANTED.

Petitioner, acknowledging that there is no Federal statute authorizing a transfer, argues that a transfer may be predicated on provisions of the constitution and statutes of the State of California (Pet., pp. 6-8). Petitioner has cited no decision, and we know of none, in which it has been determined that a Federal court may obtain such authority from state law. Indeed, this argument is directly contrary to the fundamental rule that the jurisdiction and powers of the lower Federal courts are limited to those which are authorized by acts of Congress (*American Fire & Cas. Co. v. Finn* (1951) 341 U.S. 6, 17-18; *Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 376; *Kentucky v. Powers* (1906) 201 U.S. 1, 24). It is ele-

mentary that the Rules of Decision Act (28 U.S.C. § 1652), relied upon by petitioner (Pet., p. 8), does not apply to cases, such as this one, which have their foundation in Federal law (*Maternally Yours v. Your Maternity Shop* (2 Cir. 1956) 234 F.2d 538, 540, ftn. 1; see generally Moore's Federal Practice (2nd Ed. 1965) Vol. 1A, para. 305(3), pp. 3052-3057). And, even in those cases in which it does apply, it is applicable only to substantive law and not to procedural matters (*United States v. F.D. Rich Company* (9 Cir. 1970) 441 F.2d 1143, 1144, certiorari denied (1971) 404 U.S. 823; *Cockrell v. Ferrier* (5 Cir. 1967) 375 F.2d 889, 890), such as the transfer of cases between Federal courts (*Atkins v. Schmutz Manufacturing Company* (4 Cir. 1970) 435 F.2d 527, 537, certiorari denied (1971) 402 U.S. 932).

Petitioner also erroneously relies upon certain Federal statutes which provide for transfer of cases in limited situations—none of which is comparable to the present case. Title 28, section 1406(a), of the United States Code (Pet., p. 7) provides only that a district court may order transfer of a case in the event of improper venue. *Goldlawr, Inc. v. Heiman* (1962) 369 U.S. 463 (Pet., p. 7) held that § 1406(a) permits transfer whether or not the transferor court has personal jurisdiction over the defendant. Similarly, *Peoples Bank & Trust Co. v. Rue* (N.D. Iowa 1962) 210 F.Supp. 952 and *Ferguson v. Kwik-Chek* (D.V.I. 1970) 308 F.Supp. 78 (Pet., p. 7) involve only transfers, pursuant to § 1406(a), by courts lacking personal jurisdiction over the defendants. Section 1406(a) does not, even in the situation covered by that statute, authorize transfer by a district court which has no juris-

diction over the subject matter (*First Nat. Bank of Chicago v. United Air Lines* (7 Cir. 1951) 190 F.2d 493, 496, reversed on other grounds 342 U.S. 396; *United States ex rel. Jimenez v. Conboy* (S.D.N.Y. 1970) 310 F.Supp. 801, 803; *Hughes v. Quigley* (D.N.J. 1960) 184 F.Supp. 568, 569).

Petitioner can find no comfort in 28 U.S.C. § 1406(c) (Pet., p. 7). That section merely grants to a district court the limited power to transfer a case to the Court of Claims when the case is within the exclusive jurisdiction of that latter court.

Petitioner also erroneously relies on *Koehring Co. v. Hyde Constr. Co.* (1966) 382 U.S. 362 (Pet., p. 7), a case involving interpretation of 28 U.S.C. § 1404(a) which grants power to a district court to transfer a case for the convenience of the parties and witnesses. In that case, a district court had failed to follow a court of appeals mandate to transfer. This Court held (382 U.S. 364-365) that, in the unusual circumstances of the district court's failure to follow instructions, the court of appeals could itself order transfer to another district court. If this were not so, a court of appeals would be powerless to enforce its valid orders in the face of a recalcitrant district court. The decision does not even remotely suggest that, in the absence of a statute which grants the power to transfer, a court may transfer a case over which it has no jurisdiction.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated: San Francisco, California,
January 30, 1974.

JAMES A. DEBOIS
RICHARD B. DAUGHERTY
WALTER R. ALLAN
DUDLEY A. ZINKE
Attorneys for Respondent
The Pacific Telephone and
Telegraph Company.

(Appendix Follows)

Appendix

STATUTES

47 U.S.C. §402(a), (b), (c) and (e) (in pertinent part):

"(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 19A of Title 5.

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

• • • • •

"(c) Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper.

Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

* * * * *

"(e) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

* * * * *

"* * * (June 7, 1934, ch. 426, 48 Stat. 926; June 19, 1934, ch. 652, § 402, 48 Stat. 1093; May 20, 1937, ch. 229, §§ 11-13, 50 Stat. 197; May 24, 1949, ch. 139, § 132, 63 Stat. 108; July 16, 1952, ch. 879, § 14, 66 Stat. 718; Aug. 28, 1958, Pub. L. 85-791, § 12, 72 Stat. 945)"[3]

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[3]Chapter 19A of Title 5, to which reference is made in § 402 (a), was replaced by 28 U.S.C. §§ 2342 and 2343 in the general revision of Title 5. Chapter 19A itself had previously replaced Public Law 901, Eighty-first Congress, approved December 29, 1950, to which reference is made in the statutes at large (66 Stat. 718).

28 U.S.C. § 2342:

"The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

"(1) all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47;

"(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

"(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46; and

"(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

"Jurisdiction is invoked by filing a petition as provided by section 2344 of this title."

28 U.S.C. § 2343:

"The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

28 U.S.C. § 1404(a):

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. § 1406(a) and (c):

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

• • • • •

"(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court."

28 U.S.C. § 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

28 U.S.C. § 2112(a) (in pertinent part):

"If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals."

RULES OF COURT

Federal Rules of Civil Procedure, Rule 12(h)(3):

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Federal Rules of Appellate Procedure, Rule 26(b):

> "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law."

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 2 1974
MICHAEL RODAK, JR., CLERK

No. 73-930

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARITIME COMMUNICATIONS SERVICE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission,
Washington, D.C. 20554.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner Maritime Communications Service (MCS) seeks review of an order of the court of appeals entered on September 20, 1973, dismissing MCS' petition for review of an order of the Federal Communications Commission. The petition was dismissed for lack of jurisdiction because a notice of appeal had not been filed with the court within the thirty-day period required by statute, 47 U.S.C. 402 (b)(1) and 402(c) (Pet. 3).

The Commission's order, denying MCS' application for a new public coast radio station because the new

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station would cause mutually destructive interference with an existing station, was issued on April 3, 1973. On May 2, 1973, MCS filed a petition for review "pursuant to Section 402(b)(1) of the Communications Act" in the Court of Appeals for the Ninth Circuit, despite the fact that Section 402(b) specifies that such cases are exclusively within the jurisdiction of the Court of Appeals for the District of Columbia Circuit. By order dated May 31, 1973, the Ninth Circuit recognized that it was without jurisdiction and directed that the matter be transferred to the District of Columbia Circuit, without prejudice (Pet. App. A). Thereafter, in its order of September 20, 1973, the District of Columbia Circuit dismissed the petition for review (Pet. App. B).

The court correctly dismissed the case. The Act provides that a notice of appeal must be filed "with the court [of appeals for the District of Columbia Circuit] within thirty days from the date upon which public notice is given of the decision or order complained of" (47 U.S.C. 402(c)). MCS did not do so. Instead, it filed its appeal with the Ninth Circuit—a court without jurisdiction over the appeal—and the case was not transferred to the District of Columbia Circuit until after the time for filing had expired. Failure to file within the time and in the court specified by statute is a jurisdictional defect which requires dismissal of the case.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission.

FEBRUARY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

SUPREME COURT, U. S.

FILED

FEB 14 1974

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Supreme Court of the United States

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MARITIME COMMUNICATIONS SERVICE,

Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

PETITIONER'S REPLY MEMORANDUM

RONALD E. MATTESON,
LOREN R. MCQUEEN,
2633 S. Bascom Ave.
Campbell, Ca 95008

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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Petitioner,

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Respondent.

PETITIONER'S REPLY MEMORANDUM

The Opposition of Pacific Telephone Company, Pacific, is generally not responsive to the major issue at hand and their preliminary statement is mostly inaccurate. Pacific's Opposition contains excessive material relating to the fact that petitioner should have initially filed its petition for review in the District of Columbia Circuit. Petitioner has already conceded that it inadvertently filed in the wrong court. The Opposi-

tion excessively delves upon the fact that certain Federal Courts, when lacking subject matter jurisdiction, have dismissed the case. This situation does not exist since the Ninth Circuit, realizing that it lacked subject matter jurisdiction, transferred the case rather than to dismiss it. The Court was aware of the fact that a statute of limitation would prevent any further action by petitioner and dismissal would terminate petitioner's rights.

Pacific attempted to rephrase the question presented but failed to correctly do so. The major question involves preservation of a cause by transfer of the case due to the fact that a statute of limitation will prevent any further filing, therefore, certain legal rights will be lost. A majority of states favor preservation of a cause by transfer while the Federal Courts generally follow the harsh approach of dismissal. This most important issue, considering transfer by a court which lacks subject matter jurisdiction, has not been decided by this Court, (8 L. Ed. 2d 858, §7).

Pacific believes that Petitioner's statement of the case is inaccurate and that much of it irrelevant. Pacific has failed to point out the inaccurate and irrelevant statements.

Pacific erroneously claims that petitioner has not cited any decision relating to a Federal Court's use of state law in reference to 28 U.S.C. §1652. Apparently Pacific failed to refer to (*Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 411, footnote 8). Pacific concludes that if 28 U.S.C. § 1652 does apply then Federal

Courts will follow substantive law of the state. Nevertheless, it is possible for a Federal Court to consider California Code of Civil Procedure §396 as being substantive since the outcome in a Federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court, (*Guaranty Trust Co. v. York*, 326 U.S. 109).

(*Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362) held that a Court of Appeal can transfer a case and petitioner relies on the case for that fact—whether the transfer is to prevent the termination of legal rights or whether the transfer is for enforcement of valid orders.

(*Timken Roller Bearing Co. v. Penna. R. R. Co.*, 274 U.S. 186, 187; see Pacific Opposition p. 6) follows present United States Legislative intent in that the basic foundation of the Transfer Act is directed toward the merits of a case and not toward jurisdiction, therefore, transfer and not dismissal is the proper procedure. The Transfer Act might also apply as between different appellate courts by arguing the philosophy applied to 28 U.S.C. §1404(a), (*Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362), whereby it was inferred that §1404(a) also applied to a Court of Appeal.

A majority of states favor preservation of an action that is filed in a Court which lacks subject matter jurisdiction while the Federal Courts generally favor the harshness of dismissal. This Court could now de-

cide which position should be applied in this proceeding when also considering the interest of justice.

Dated: February 12, 1974.

Respectfully submitted,

RONALD E. MATTESON,

LOREN R. MCQUEEN,